unjust or oppressive to return him to the country seeking his return. Contrary to what I have expressed in the course of the proceeding, my answer is "no". This Court has no power to do so. Section 365 of the Criminal Procedure Code gives power to the High Court to direct persons detained under the Extradition Ordinance or the Commonwealth Fugitive Criminal Act 1967 be set at liberty. The section does not specify on what grounds can they be set free. The Extradition Ordinance 1958 does not provide the power. This is different in the case of the Commonwealth Fugitive Criminal Act 1967, where section 27 of the Act empowers the Minister if it appears to him that by reason of trivial nature of the case or application for surrender or return is not made in good faith or in the interest of justice or being made for political reasons or any other reason, it is unjust or inexpedient to surrender the fugitive criminal, the Minister may by order stay any proceedings and direct any warrant issued or endorsed to be cancelled and the person be discharged.

For the above reasons, this application for *habeas corpus* is refused. I also direct that the warrant of committal (Form D) be remitted to the committal Magistrate for him to amend the first part of the order to include the proper crime or offences under the Australian Crimes Act 1958.

Application dismissed.

Solicitors: *Yusuf Gulam Lee & Co.*

PAVONE v. PUBLIC PROSECUTOR

[A.Cr. J. (Edgar Joseph Jr. J.) September 5 & 6, 1983]
[Penang – Criminal Appeal Nos. 18 and 22 of 1983]

Criminal Law and Procedure – Trafficking in dangerous drug – Accused found in possession of powdery substance – Investigating officer after testing substance indicated substance was opium – Government Chemist subsequently certifying that substance was heroin – Evidence by investigating officer – President of Sessions Court rejected evidence of Investigating Officer – Report of Government Chemist accepted but he was not called to give evidence – President ruling there was a case to answer – Accused elected to remain silent – Question at close of prosecution case – Conviction set aside – Retrial ordered – Criminal Procedure Code (F.M.S. Cap. 6), ss. 173, 399 & 422.

In this case the appellant had been convicted in the Sessions Court upon a charge of trafficking in a dangerous drug, to wit 402 grammes of heroin and sentenced to life imprisonment. At the trial evidence was given that the Investigating Officer tested a sample of the subtance found on the accused and gave his opinion that the subtance was opium. Subsequently the substance was sent to the Government Chemist who examined the substance and certified it was heroin. The learned President of the Sessions Court said she attached no weight to the evidence of the investigating officer, as there was no evidence that he had even the most basic training in chemistry. She relied on the certificate of the Government Chemist and ruled that there was a case to answer. When the appellant elected to say nothing she observed she had no alternative but to find him guilty as charged. The investigating officer was not examined as to his competence nor was the Government Chemist called to testify in court.

Held: (1) the sole question at the close of the case for the prosecution was whether or not a *prima facie* case has been made out, that is to say, whether there was some evidence (not inherently incredible) which, if believed established the essential elements of the offence charged. If there is such evidence, then the defence must be called, but care must be taken to leave suspended the question of the veracity and accuracy of recollection of witnesses until after the close of the case for the defence;

(2) in this case the learned President had determined the issue of the veracity and recollection of witnesses for the prosecution before she called upon the defence. This was clearly wrong as it amounted to a provisional verdict of guilty thus raising the question whether the appellant was deprived of the substance of a fair trial. However, having regard to the compulsive nature of the evidence for the prosecution, which was uncontradicted by the defence, the misdirection was of no consequence, as the learned President would on a proper direction have still convicted;

(3) the learned President was perfectly entitled to prefer the Chemist's report to the evidence of the investigating officer but she has to go about this task correctly by probing the subject of the investigating officer's competence;

(4) the conviction must be set aside and a retrial ordered.

Cases referred to:

(1) *Public Prosecutor* v. *Man bin Abas* 1 M.C. 160.
(2) *Haw Tua Tau* v. *Public Prosecutor* [1981] 2 M.L.J. 49.
(3) *Ragunathan* v. *Public Prosecutor* [1982] 1 M.L.J. 139
(4) *Re Adam Aman; Hoesin bin Ghani* v. *Public Prosecutor* [1958] M.L.J. 229
(5) *Sia Soon Suan* v. *Public Prosecutor* [1966] 1 M.L.J. 116.
(6) *Rex* v. *Howe* 2 M.C. 109, 110.

CRIMINAL APPEAL.

Karpal Singh for the appellant.

Bazain bin Idris, (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Edgar Joseph Jr. J.: At the conclusion of the arguments yesterday I said I would deliver judgment today which I now do.

This Appellant was prosecuted in the Sessions Court at Penang upon a charge alleging that he did on August 7, 1982 at 6.00 p.m. at the Bayan Lepas International Airport, in the State of Penang, traffic in a dangerous drug, to wit, 402 grammes of heroin, in contravention of the provisions of subsection (1)(a) of Section 39B of the Dangerous Drugs Act, 1952 ("the Act"). He was convicted and sentenced to life imprisonment. Against this conviction he has now appealed. There is also a cross-appeal by the Public Prosecutor alleging inadequacy of sentence and urging that there ought in addition to have been an order for whipping.

The facts appearing in the case for the prosecution fall within a short compass and may be stated thus: on the day, and at the time in question, the Appellant, an Australian national, was a transit passenger on an aircraft *en route* to Sydney via Singapore and was stopped and searched by an Auxillary Police Officer, Wan Mohamed bin Wan Ismail (P.W.1), in the Search Room at the Bayan Lepas International Airport. P.W.1 felt something tied around the Appellant's waist and, upon being queried as to what this was, the Appellant replied that it was "fertiliser for his plants." He was asked to remove it, which he did, and it was then observed that what was tied around the Appellant's waist was a white cloth pouch which had been sewn all round. Another officer, Azmi bin Yahaya (P.W.2), slit open the pouch and discovered two plastic bags (Exhibits P2 and P3), one inside the other, containing an off-white powdery substance. As these were suspected to be a dangerous drug. A.S.P. Fariduddin bin Dato Ahmad (P.W.7) of the Anti-Narcotics Bureau, Penang, and the Investigating Officer in the case, was summoned to test P3. He arrived three hours later and took a sample of P3, inserted it into a test tube taken from his test kit provided by his department, broke the seal inside, shook it, whereupon the liquid turned purple which, in his opinion, indicated that the substance was opium. He then reported the result of this test to Supt. Nathan Ha, his superior, but threw away the tube he used for the test and its contents instead of submitting it to the Chemist for analysis. Later, the Appelant was placed under arrest and, in due course, P3, which was kept in a safe in the armoury of the police station at Bayan Lepas, was taken by P.W.7 to the Government Chemist who examined the contents and certified in his report that the plastic bag concerned contained 1,105 grammes of an off-white substance which in turn contained 402 grammes of heroin, a dangerous drug as defined in section 2 of the Act. A copy of this report was duly served upon the Appellant, in accordance with the provisions of section 399 of the Criminal Procedure Code, but he did not require the Chemist to attend the trial to give evidence.

Upon these facts, the learned President of the Sessions Court overruled a submission of no case to answer and called for the defence. The Appellant elected to say nothing, called no evidence, and was duly convicted and sentenced as aforesaid. She however exercised her discretion in favour of the Appellant and did not order any whipping.

Before me, the conviction has been attacked by Mr. Karpal Singh, with his usual vigour, chiefly on the ground that there being a discrepancy as between the evidence of P.W.7 on the one hand, and the Report of the Chemist on the other, as to the kind of drug P3 was, the learned President ought to have held, either, that there was insufficient evidence that what was examined by the Chemist was in fact the substance recovered from the person of the Appellant or, alternatively, that the exact offence charged, namely, possession of 402 grammes of heroin, had not been proved by the prosecution especially since there was no evidence that heroin is a derivative of opium, and should accordingly have acquitted and discharged the Appellant at the close of the case for the prosecution.

The learned President has written well-arranged grounds of decision and plainly recognised the force of these submissions but concluded by saying that she "could attach no weight to the evidence of the test conducted by P.W.7." She reasoned that there was "no evidence that P.W.7 had even the most basic training in Chemistry." Nor was there "any evidence as to what sort of test was used or whether P.W.7 was properly instructed on the use of it." She accordingly ruled that there was a case to answer and when the Appellant elected to say nothing she observed that she had no alternative but to find him guilty as charged.

Before I proceed to consider Mr. Karpal Singh's submissions, I think I should make some comments on the above observation by the learned President even though neither counsel did so. It is implicit in the observation that the learned President had determined the issue of the veracity and accuracy of recollection of the witnesses for the Prosecution before she called upon the defence. This was clearly wrong as it amounted to a provisional verdict

of guilty thus raising the question whether the Appellant was deprived of the substance of a fair trial, a matter of the first importance in the administration of criminal justice in any country following a Common Law system.

Now, the sole question at the close of the case for the prosecution is whether or not a *prima facie* case has been made out, that is to say, whether there is some evidence (not inherently incredible) which, if believed, establishes the essential elements of the offence charged. If there is such evidence, then the defence must be called but care must be taken to leave suspended the question of the veracity and accuracy of recollection of witnesses until after the close of the case for the defence. This applies even where, as here, the defence elects to remain silent and calls no evidence. Consequently, in a proper case, there is nothing illegal in a Magistrate or a President, or a Judge sitting alone or with Assessors, calling for the defence upon *prima facie* evidence being adduced and then proceeding to acquit and discharge even when the accused elects to remain silent and to call no evidence if not satisfied that the charge has been established by the prosecution beyond all reasonable doubt. In my opinion, therefore, the case of *Public Prosecutor* v. *Man bin Abas*[1] would today have been differently decided.

It will be readily recognised that the above propositions are distilled from the judgment of Lord Diplock delivering the advice of the Judicial Committee of the Privy Council in the Singapore case of *Haw Tua Tau* v. *Public Prosecutor*[2] approved and applied in the Federal Court decision of *Rangunathan* v. *Public Prosecutor.*[3], a decision which, of course, is binding on me notwithstanding the powerful dissent of Professor Ahmad Ibrahim in his comprehensive article entitled *"Haw Tua Tau* v. *Public Prosecutor* – duty of Court at end of Prosecution Case – Must we follow the Privy Council? [1981] J.M.C.L. 223.

I do not however consider this misdirection to be of any consequence because I am amply satisfied, having regard to the compulsive nature of the evidence for the prosecution which was uncontradicted by the defence, that the learned President would, on a proper direction, have still convicted: (section 422 Criminal Procedure Code).

I now return to Mr. Karpal Singh's submission which I have referred to in paragraph five *supra.* Encik Mohd. Bazain bin Idris, the learned Deputy, replied that the learned President was perfectly entitled to prefer the report of the Chemist to the evidence of P.W.7 as to the kind of drug P3 was. In this, I think, he is right. A Court of Trial when faced with a conflict of testimony frequently has to sift the evidence but this has to be done properly, so the question arises whether the learned President had gone about this task correctly.

I have already observed that she chose to disregard the evidence of P.W.7 for the reason that there was no evidence as to his competence to testify regarding the nature of the drug. Yet, at no time when P.W.7 was in the witness box did she put to him a single question to determine such competence nor did she summon the Chemist to testify in Court although she had ample powers and, indeed, was under a duty to do so, in order to satisfy the insistent demands for justice: (*Re Adam Aman Hoessin bin Ghani* v.*Public Prosecutor*)[4]. It must be recognised that P.W. 7 at the material time belonged to the Anti-Narcotics Bureau, Penang, and was an officer of no mean rank, being then an Assistant Superintendent of Police. He was also the Investigating Officer in the case, and naturally, a principal witness for the prosecution. By calling him and not applying to have his credit impeached, the prosecution were representing him as a witness of truth. Not only that, he was armed with a test kit specially provided by his department for the purpose of checking for drugs. Presumably, therefore, he knew what he was talking about when he said P3 contained opium. On the other hand, in fairness to the learned President, neither did the Prosecuting Officer re-examine P.W.7 or apply to call the Chemist or even make a submission as regards this part of the case.

Clearly, therefore, P.W.7's competence was questioned for the first time by the learned President in her grounds of decision after Notice of Appeal was filed. In my view, she was perfectly entitled to prefer the Chemist's Report to the evidence of P.W.7 but, as I have already said, she had to go about this task correctly by probing the subject of P.W.7's competence in the way I have indicated above. "The requirements of strict proof in a criminal case," said H.T. Ong, Acting Chief Justice (as he then was) in *Sia Soon Suan* v. *Public Prosecutor*[5], "cannot be relaxed to bridge any material gap in the prosecution evidence. Irrespective of whether the court is otherwise con vinced in its own mind of the guilt or innocence of an accused, its decision must be based on the evidence adduced and nothing else ...". In the circum-

stances, there being a misdirection by way of non-direction, in the course of the trial, which related to a fundamental issue and travelled to the root of the charge, the principle involved is more important than the case itself and so, the conviction cannot stand.

I next have to consider whether a retrial should be ordered. Mr. Karpal Singh has strongly urged upon me that to order a retrial would merely afford the prosecution a second opportunity of proving a case which they had failed to prove. I recognise the force of this submission and am mindful of the salutary observations of Murison, C.J. in *Rex* v. *Howe*[6] on this subject. But equally, I cannot overlook the fact that the unchallenged and uncontradicted evidence against the Appellant was absolutely overwhelming. In this context, I would instance the circumstances in which the offending exhibit was recovered from his person, concealed in a cloth pouch cunningly tied around his waist, the fact that when queried as to it, he replied that it was fertiliser for his plants nor, for that matter, did he care to explain its possession when called upon for his defence in the court below, although he faced a charge of the utmost gravity, carrying a mandatory sentence of life impriosnment with liability to whipping up to twenty four strokes of the ratan. Also, whether P.W.7's evidence or the Chemist's Report is accepted, the offending exhibit was still a dangerous drug within the meaning of the Act. Lastly, there is the element of public interest which is emphasized in the more stringent measures recently introduced by the Dangerous Drugs (Amendment) Act, 1983, to combat the drug menace which is now a national security problem.

I accordingly quash the conviction, set aside the sentence and direct a re-trial before another President. The Appellant will be remanded in custody pending the re-trial. The Public Prosecutor's appeal against sentence is, in consequence, dismissed.

Order accordingly.

Solicitors: *Karpal Singh & Co.*

ABDUL KADIR BIN ABDUL RAHMAN v. PUBLIC PROSECUTOR

[A.Cr. J. (Shankar J.) September 13, 1983]
[Johore Bahru – Criminal Appeal No 8 of 1982]

Criminal Law & Procedure – Criminal breach of trust by public servant – Plea of guilt – Appeal after sentence – Whether appellant should be allowed to retract plea of guilt – Penal Code, s. 409.

Legal Profession – Accused should plead guilty or claim trial by his own mouth and not through his counsel or advocate – Legal Profession (Practice and Etiquette) Rules 1978, r. 16.

The appellant, a public servant and Postmaster of the Post Office at Scudai, Johore was charged with criminal breach of trust of $200.00 cash belonging to the Government of Malaysia, being money deposited with the Post Office Savings Bank Malaysia. The said offence was punishable under section 409 of the Penal Code.

The facts revealed that the accused had received the sum of $200.00 from the complainant and had made the relevant entry into the complainant's savings bank book, but had not made a corresponding entry into the register containing all the takings for the day which it was the appellant's duty to keep and maintain. In response to an audit query two weeks later by headquarters the appellant could not account for the missing $200.00. The said facts were admitted by the accused. He was then convicted and counsel made a lengthy plea of mitigation but nowhere in the plea was there any attempt to explain what might have become of the missing $200.00. The learned President sentenced the appellant to 18 months' imprisonment and she granted a stay of execution pending appeal.

The issue before the court was whether the appellant should be allowed to retract his plea of guilt.

Held, dismissing the appeal: (1) whilst there is a discretion vested in the trial court to permit an accused person before sentence to withdraw a plea of guilt and to substitute a plea of not guilty that discretion requires to be exercised judicially and for valid reasons. An accused person cannot be permitted merely at his whim to change his plea except on valid and sufficient grounds which satisfy the magistrate that it is proper in the interest of justice that he be allowed to do so:

(2) in this case there was no justification for permitting the appellant to indirectly seek to reverse his plea of guilt by inviting the court to exercise its revisionary powers;

(3) there can be no gainsaying that public servants receiving money from other members of the public must show very high standards of probity in the discharge of their fiscal duties. The loss of confidence in public institutions is incalculable when a public servant chooses to abuse his position of trust, as happened in this case. A deterrent sentence was rightly called for;

(4) an accused person should plead guilty or claim trial by his own mouth and not through his counsel or advocate. Once the plea of guilt is entered, it is the duty of counsel who still feels that the facts do not amount to an